

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Smith Bagley, Inc.)
Petition for Designation as an)
Eligible Telecommunications)
Carrier Under 47 U.S.C. § 214(e)(6))
FCC 97-419)

CC Docket No. 96-45
DA 99-1331

COMMENTS
OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative Association ("NTCA") submits these comments in response to the Commission's Public Notice, DA 99-1331, released on July 6, 1999 in the above captioned matter.

NTCA is a national association of 500 local exchange carriers ("LECs"), including tribally owned companies. These LECs provide telecommunication services to end users and interexchange carriers throughout rural America, including areas that are federally reserved Native American lands.

I. INTRODUCTION

State commissions are responsible for designating eligible telecommunications carriers under Section 214 of the Communications Act in all cases except those authorized by a 1997 technical amendment that accommodated carriers that are not subject to the jurisdiction of a State

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Commission. 47 U.S.C. § 214(e)(6) provides for Federal Communications Commission designation “[i]n the case of a common carrier . . . that is not subject to the jurisdiction of a State commission....”¹ In such a case, the Commission, like any state commission must find that the requesting common carrier meets the requirements of section 214(e)(1). A designated eligible carrier must (1) offer the services that are supported by Federal Universal service support mechanisms. Section 214(e)(1)(A). In areas served by a rural telephone company, the Commission, like the States, must find that the designation is in the public interest. Section 214 (e)(1)(6).

The Commission established procedures for FCC designation of eligible carriers in a Public Notice, FCC 97-419, (Released December 29, 1997). The FCC has only designated carriers as eligible telecommunications carriers (“ETCs”) on Native American land when the carrier has established through appropriate documentation that the carrier is not subject to the jurisdiction of a state commission. The 214(e)(6) Public Notice requires carriers seeking status as a carrier not subject to the jurisdiction of a state commission to provide certification and a brief statement of the supporting facts demonstrating that the petitioner is not subject to the jurisdiction of a state commission. The 214(e)(6) Public Notice also requires petitioners to provide a copy of its petition for designation to the relevant state commission.

Smith and Baglely, Inc. (“SBI”) is a District of Columbia corporation. It seeks designation for the federally reserved Native American lands within its service area. It has submitted a map

¹Public Law 105-125.

which shows that it is licensed to provide service in Arizona and New Mexico Rural Service Areas ("RSAs") that include the Navajo and Hopi reservations.

II. PETITIONERS HAVE FAILED TO SHOW THAT THE STATE HAS NO JURISDICTION TO DESIGNATE THEM AN ELIGIBLE CARRIER.

The terms of Section 214 (e)(1)(6) specifically require that the Commission act only in cases where the common carrier seeking ETC status is not subject to the jurisdiction of a State Commission. SBI has not shown that it is not subject to the jurisdiction of the Arizona or New Mexico State Commission. The fact that SBI is a wireless carrier does not deprive the State Commissions of jurisdiction over designation. Section 332(c)(3) of the Act prohibits the regulation of commercial mobile radio services entry and rates but leaves other terms and conditions of service open to state regulation.² Furthermore, unlike the case of *Fort Mojave*³ which SBI relies on, there is no assertion that the Arizona Corporation Commission or the New Mexico Public Regulation Commission have notified this Commission that they have no jurisdiction over SBI.

The legislative history of Section 214 (e)(1)(6) demonstrates that SBI must show that it is not subject to the jurisdiction of either state commission. In the Senate, debates on Public Law 105-125 which added subsection (e)(6) to section 214 (e) of the Communications Act of 1934 as

² "State Preemption... no State or local government shall have any authority to regulate the entry of or the rates charged by an commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3).

³ Designation of Fort Mojave Telecommunications, Inc., et.. al., 13 FCC Rcd 4547, (Common Carrier Bureau, 1998). (Hereafter Designation).

amended, Senator McCain who sponsored the amendment stated, "This bill does nothing to alter the existing jurisdiction that state commissions already have over local exchange carriers or providers of commercial mobile radio services as set forth in Section 332(c)(3) of the Telecommunications Act." 105 Cong. Rec. S12,568 (1997).⁴ SBI must show that Section 332 (c)(3) does not apply to the services it seeks to offer. Neither the maps nor the advertisements attached as exhibits to SBI's establish that the states where it offers wireless service have no jurisdiction over SBI. Inasmuch as the legislative history and the text of the statute show that the intent was to create a forum for carriers that do not have the option to apply to a state for designation, the Commission should require a clear showing of jurisdiction before it proceeds. SBI has not shown that the state option is not available to it.

III. THE COMMISSION SHOULD NOT ACT ON SBI'S REQUEST UNTIL IT DECIDES PENDING ISSUES ON PORTABILITY.

Even if the Commission decides that it has jurisdiction in this case, it should delay a decision on SBI's petition until it decides critical universal issues that will affect the outcome of the petition. The Commission cannot at this time decide as it is required to do in an ETC

⁴ In the House: Representative Hayworth stated, "The current language in section 214(e) does not account for the fact that State commission in some states have no jurisdiction over certain carriers. Some, not all, but some States [sic] have no jurisdiction over tribal-owned carriers, which may or may not be regulated by a tribal authority that is not a State commission per se." 105 Cong. Rec. H10807-08 (1997). To date, the FCC has only designated carriers as eligible telecommunications carriers on Native American land when the carrier is tribally owned: Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., Tohono O'dham Utility Authority and Saddlebrook Communications. See, Designation 13 FCC Rcd 4547, (Common Carrier Bureau, 1998) and See also, Petition of Saddleback Communications for Designation as an Eligible Carrier, 13 FCC Rcd 22433 (Common Carrier Bureau 1998).

designation request whether or not SBI will be able to offer the services that are supported by Federal Universal service support mechanisms. Section 214(e)(1)(A). SBI claims that it offers all of the services supported by the federal USF, including local usage.⁵ However, the Commission has not yet decided what constitutes "local usage" for wireless carriers.⁶ SBI's attachment indicates that the 25 minutes for \$20 rate it is offering is an exorbitantly high \$.80 per minute charge for local use. SBI has also not followed procedures for certifying that it is offering all the supported services.⁷

The Commission should also decide other issues related to the portability of support before it decides this case. To the extent that SBI's request involves rural telephone company service areas, additional public interest findings are required. SBI requests and the Commission must make a public interest finding because the request involves rural telephone company service areas. But a public interest determination in this case is related to the broader issues that are before the Commission in pending Rural Telephone Coalition petitions for reconsideration of the portability rules and Universal Service Administration Company letters seeking

⁵ See, Smith Bagley, Inc. Petition for Designations as an Eligible Telecommunications Carrier, CC 96-45, July 7, 1999, para 3.

⁶The Commission is deciding what constitutes "local usage" for wireless carrier in *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, Federal-State Joint Board on Universal Service, 13 FCC Rcd 21253 (Common Carrier Bureau, 1998).

⁷ In the cases of Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., and Tohono O'dham Utility Authority the carriers offered sworn statements certifying that they were already providing all of the services authorized for support. (An exception was made for Tohono O'dham because it did not yet have the technology to for toll limitation.) See, *Designation of Fort Mojave Telecommunications, Inc., et al.*, 13 FCC Rcd 4547, 4551, (Common Carr. Bureau, 1998)

clarification of the portability rules. The RTC petition requests reconsideration because awarding support to competing ETCs on the basis of the incumbent's cost paves the way for cream skimming and ultimately increases costs to the ILEC's remaining customers.⁸ USAC seeks clarification of the portability rules because it is not clear whether new lines served by ETCs are considered "captured" under Section 54.307 of the Commission's rules or how support is to be apportioned between the ILEC and the competing ETC in the case of undefined "captured" lines⁹

⁸ See *Petition for Reconsideration and Clarification of the Rural Telephone Coalition*, Federal State Joint Board on Universal Service, CC Docket No. 96-45, July 17, 1997.

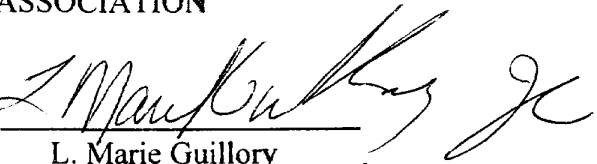
⁹ See USAC letters of February 1998.

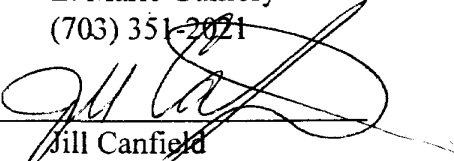
IV. CONCLUSION

For ~~the~~ foregoing reasons, the Commission should delay a decision on SBI's request until it has determined how to revise its portability rules to prevent cream skimming, clarified the application of the portability rules to captured lines and obtained sufficient information and certifications to determine that SBI is not subject to State jurisdiction.

Respectfully submitted,

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July 27, 1999

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Comments of the National Telephone Cooperative Association in CC Docket No. 96-45, DA 99-1331 was served on this 27th day of July 1999 by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:


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